

CHAPTER 7 – FINAL HEARING

STATUTORY REFERENCES: **RSA 173-B:3 (Commencement of Proceedings; Hearing)**
 RSA 173-B:5 (Relief)
 RSA 173-B:10 (Protection by Peace Officers)
 RSA 458:17 (Support and Custody of Children)

CROSS REFERENCE: **Chapter 17 - Domestic Violence Registry**

INTRODUCTION

As noted in the previous chapter, final hearings are normally scheduled within 30 days of the plaintiff's petition unless the defendant has requested an expedited hearing or could not be served in a timely manner.

A. **COURTROOM SECURITY**

The volatility of domestic violence cases demands that extra precautions be taken before, during and after the hearing to insure the safety of the parties and court personnel.

PROTOCOL 7-1

A court security officer (CSO) should be present during all domestic violence hearings where both parties appear.

PROTOCOL 7-2

The parties should be kept separated before, during and after the hearing.

PROTOCOL 7-3

When the hearing has concluded, the CSO will make certain that the parties remain

separated.

COMMENT

Court personnel must be alert for individuals present in court who are associated with the parties involved in the domestic violence hearing who could possibly cause harm or otherwise be disruptive prior to, during and after the hearing. Steps should be taken to ensure the safety of both parties and prevent any violent activity in the court building or on the grounds of court property. Where possible, one method to keep the parties apart is to have the CSO stay in the courtroom with the defendant while court personnel assist the plaintiff in addressing administrative requirements prior to leaving the building. After the plaintiff has left the area, the defendant will then be allowed to leave.

B. CONDUCT OF HEARING

The domestic violence statute anticipates a procedure that is informal in style and designed for pro se litigants. While the court should be careful to have each witness offer testimony under oath, there is no requirement that the formalities of a trial be followed. The court is not bound by the technical rules of evidence and may admit evidence which it considers relevant and material. To the extent the court allows cross-examination, it should be carefully controlled by the judge.

PROTOCOL 7-4

The hearing should be held in a courtroom or other hearing room at the courthouse.

PROTOCOL 7-5

Prior to commencement of the hearing, the court should obtain the defendant's date of birth, social security number, and physical description, if not already provided to the court.

PROTOCOL 7-6

The court shall instruct both parties to keep the court informed of any address or telephone number changes.

PROTOCOL 7-7

If the plaintiff is accompanied by an advocate, the advocate should be allowed at counsel table and may be allowed limited participation in the proceedings at the request of the plaintiff.

COMMENT

Questions from the court should be addressed to the plaintiff.

PROTOCOL 7-8

If a DOVE attorney has been requested but is unable to be present at the scheduled hearing, the court should consider granting a brief continuance to allow counsel's participation.

C. EVIDENCE

PROTOCOL 7-9

Pursuant to RSA 173-B: 3, VIII, the Rules of Evidence do not apply to domestic violence cases.

PROTOCOL 7-10

The plaintiff must establish by a preponderance of the evidence that the defendant has abused the plaintiff within the meaning of RSA 173-B: 1. The Plaintiff must also demonstrate that the defendant poses "a credible threat to the plaintiff's safety." A plaintiff is not required to offer proof of imminent danger as would be required before a temporary order could be issued.

D. DURATION

PROTOCOL 7-11

All final orders must be for a fixed period of time not to exceed one year. As a general matter, all final orders should be made effective for one year.

E. RELIEF AVAILABLE

RSA 173-B:5, I provides that if the plaintiff sustains the burden of proof by a preponderance of the evidence that abuse exists and that the defendant presents a credible threat to the plaintiff's safety, the court shall grant final protective orders. (See In The Matter of Alexander and Evans, NH Supreme Court, Feb. 11, 2002.) However, if the court finds no abuse or the parties stipulate that no abuse has occurred, no further orders may be entered under RSA 173-B.

If the court determines that the plaintiff has been abused, the court shall grant such relief as is necessary to bring about a cessation of abuse. The statute provides two categories that are available: Protective Relief and Other Relief. As with temporary orders, the list articulated RSA 173-B is non-inclusive and the court may include additional orders as appropriate.

NOTE: RSA 173-B:5, I mandates that upon a finding of abuse, the court shall order relinquishment of any and all firearms and ammunition in the control, ownership and possession of the defendant, or any other person on behalf of the defendant.

F. PROTECTIVE ORDERS

PROTOCOL 7-12

The protective orders available at a final hearing under RSA 173-B:5 include the following:

- a. The court may restrain the defendant from abusing the plaintiff.
- b. The court may restrain the defendant against entering the premises and curtilage where the plaintiff resides, except when the defendant is accompanied by a peace officer **and is allowed entry by the plaintiff** for the sole purpose of retrieving personal property specified by the court.

COMMENT

The only time this order is not appropriate is when the defendant exclusively owns, leases or rents and pays for the premises and the defendant has no legal duty to support the plaintiff or minor children (RSA 173-B:5, I (b)(1)).

- c. The court may restrain the defendant from having contact with the plaintiff.

NOTE: The judge should explain clearly to both parties in open court that a "no contact" order encompasses all forms of contact of direct and indirect nature and includes such contact as sending flowers, making telephone calls, third-party communication, etc. It should be made clear to the defendant that even if invited by the plaintiff to have contact, the defendant may be arrested for violating the order if contact is made. However, language should be given to the plaintiff "advising that it may be unwise and possibly unsafe to contact the defendant" as per RSA 173-B:5, VIII-a.

- d. The court may restrain the defendant from entering the plaintiff's work or school or any place frequented regularly by the plaintiff or by any family or household member.

COMMENT

It may be helpful to the defendant if specific places and distances are named in the order (and times of restricted access, if applicable).

- e. The court may enjoin the defendant against abusing the plaintiff, the plaintiff's family (regardless of their place of residence), or plaintiff's household members in any way.

COMMENT

There is no limitation on the definition of plaintiff's relatives or household members. Presumably, the protection is afforded to all household members regardless of the length of time they have been residing together.

- f. The court may enjoin the defendant against taking, converting or damaging property in which plaintiff has any legal or equitable interest.
- g. The judge must direct the defendant to relinquish any and all firearms and ammunition that are in the control, ownership, or possession of the defendant, or any other person on behalf of the defendant to the peace officer for the duration of the protective order.
- h. The court may direct the defendant to relinquish to the peace officer, any and all deadly weapons specified in the protective order that are in the control, ownership, or possession of the defendant, or any other person on behalf of the defendant for the duration of the protective order.

G. OTHER RELIEF

The statute provides for a variety of other relief at a final hearing, including the division of property, custody, support and visitation of children, batterer's intervention and compensation for plaintiff's losses.

H. DIVISION OF PROPERTY

RSA 173-B:5, I (b)(1) provides that the court may address the issue of division of property.

COMMENT

The court should make it clear to both parties that the domestic violence order relates only to the use and possession of property, not ownership.

PROTOCOL 7-13

The court may grant the plaintiff the exclusive use and possession of the premises and curtilage of the plaintiff's place of residence, unless the defendant exclusively owns or leases and pays for the premises and the defendant has no legal duty to support the plaintiff or minor children on the premises.

PROTOCOL 7-14

The court may restrain the defendant from withholding items of the plaintiff's personal property specified by the court. A peace officer shall accompany the plaintiff in retrieving such property to protect the plaintiff.

PROTOCOL 7-15

The court may order that the plaintiff have exclusive use and possession of an automobile, and may also order the defendant to make payments for the automobile, unless the defendant exclusively uses such property and has no legal duty to support the plaintiff or minor children.

COMMENT

Such an order may be particularly appropriate where the parties have a child and the plaintiff may need an automobile for work or other reasons.

PROTOCOL 7-16

The court may grant the plaintiff the exclusive right to the use and possession of the household furniture and furnishings, unless the defendant exclusively owns such property and has no duty to support the plaintiff or minor children. The court may also order the defendant to make health care, insurance, rent, mortgage or utility payments. (See RSA 173-B:5, I(b)(3) and (4).)

COMMENT

The court should attempt to set forth an order dividing personal property by engaging the parties in a discussion of this issue in the courtroom. To the extent agreement cannot be reached, the court should have each party prepare a written list of items of which that party wants possession and submit it to the court. Copies of each list should be given to the opposing party. If necessary to resolve any disagreement, a further

hearing on the issue of property division should be scheduled.

I. CUSTODY AND VISITATION

RSA 173-B:5, I (b)(5) and (6) authorize the court to enter orders of custody and visitation for minor children. The court should be mindful that any contact between the parties is potentially dangerous, and therefore, must be careful in crafting such orders. In certain very limited circumstances when considering an order for custody and/or visitation, the court may appoint a guardian *ad litem*. When a guardian *ad litem* is appointed, the court must carefully define the scope of services.

NOTE: In the event of an existing custody order, see Chapter 4 on transfer to Superior Court and the protocols regarding precedence of court orders.

PROTOCOL 7-17

Upon a finding of abuse, the court may award temporary custody of the parties' minor children to either party or, where appropriate, to DCYF.

COMMENT

Upon a finding of abuse, the court should normally award custody to the non-abusive parent.

PROTOCOL 7-18

When the court finds that neither party is capable of caring for the children, an order of custody to the Division for Children, Youth and Families may be made.

- a. Where custody of the parties' minor children with DCYF may be appropriate, the DCYF shall receive actual notice of the hearing 10 days prior to such hearing provided that, if necessary, such hearing be continued 10 days to provide DCYF adequate notice.
- b. DCYF may move at any time to rescind its custody of the parties' minor children.

PROTOCOL 7-19

The court may establish visitation rights with regard to the parties' minor children. The court shall consider, and may impose on a custody award, conditions necessary to assure the safety of the plaintiff and minor children. This may include orders denying visitation or requiring supervised visitation.

COMMENT

If visitation or visitation exchanges occur in a community other than where either of the parties resides, the local police department should be advised of the existence of the domestic violence protective order.

PROTOCOL 7-20

In determining whether visitation shall be granted, the court shall consider whether visitation can be exercised by the non-custodial parent without risk to the plaintiff's or children's safety. In making such determination, the court shall consider, in addition to any other relevant factors, the following:

- a. The degree to which visitation exposes the plaintiff or the children to physical or psychological harm.
- b. Whether the risk of physical or psychological harm can be removed by ordering supervised visitation.
- c. Whether visitation can be ordered without requiring the plaintiff and defendant to have contact regarding the exchange of children.

COMMENT

Appropriate circumstances would include where there has been violence toward the children in the past or where the non-custodial parent is alcohol or drug addicted. In the event supervised visits are ordered, the court must set forth the number of times allowed and the persons or organization expected to supervise. The court should not make an order of supervision unless the proposed supervisor agrees to this role.

J. CHILD SUPPORT

RSA 173-B:5, I (b)(7) provides that the court has authority to issue support orders.

PROTOCOL 7-21

The court may direct the defendant to pay financial support to the plaintiff or minor children, unless the defendant has no legal duty to support the plaintiff or minor children.

COMMENT

It should be presumed that the court will issue a child support order in any case in which the parties have a child in common and no other order already exists.

PROTOCOL 7-22

In every case where children are involved, the judge must instruct each party to complete a financial affidavit. The clerk's office must then perform the necessary calculations to arrive at a child support figure. All child support orders of the court should be based upon the State's Child Support Guidelines.

PROTOCOL 7-23

In any case where the court has any concern that the support order will not be followed, or it may jeopardize the plaintiff's safety, the court shall order payment through the Division of Child Support Enforcement.

COMMENT

If the court specifies that child support payments may be made directly to the plaintiff, such communication shall not be considered a violation of the "no contact" provisions of the order.

K. COUNSELING

PROTOCOL 7-24

RSA 173-B:5, I (b)(8) allows the court to direct the abuser to engage in a batterer intervention program or personal counseling. If available, such intervention and counseling program shall focus on alternatives to aggression.

PROTOCOL 7-25

The court shall not direct the plaintiff to engage in joint counseling services with the defendant. Court-ordered and court-referred mediation of cases involving domestic violence shall be prohibited.

COMMENT

Referral of the batterer to an ill-prepared or inadequately trained intervention provider can exacerbate an already fragile situation. A list of providers who comply with the Batterers Intervention Standards approved by the Governor's Commission On Domestic and Sexual Violence will be available to all court clerks. While alcohol and substance abuse counseling may be appropriate and helpful, neither substitutes for batterer intervention. The court may tie visitation or supervised visitation to meaningful participation in a batterer intervention program. See Chapter 19.

COMMENT

Since the order is against the defendant, the court has no authority to direct the plaintiff to engage in counseling or mediation.

L. COMPENSATORY DAMAGES

PROTOCOL 7-26

RSA 173-B:5, I (b)(9) allows the court to order the defendant to pay the plaintiff monetary compensation for losses suffered as a direct result of the abuse which may include, but not be limited to, loss of earnings or support, medical and dental expenses, damages to property, out- of pocket losses for injuries sustained, and moving and shelter expenses. The court may also require the defendant to pay reasonable attorney's fees.

COMMENT

When making orders for relief, the court may consider monetary compensation for losses suffered as a direct result of the abuse, which may include, but are not limited to costs of moving and shelter expenses, lost wages, reasonable attorney's fees and medical and dental expenses.

Other potential expenses may include: costs of changing phone numbers, obtaining caller ID, an unlisted number, or an answering machine. Also, mental health and/or counseling expenses, and cost of new locks and other security.

M. PRECEDENCE OF FINAL COURT ORDERS

PROTOCOL 7-27

Pursuant to RSA 173-B:5, IV, no order under RSA 173-B can supersede or affect any order pertaining to the possession of a residence, household furniture or custody of children made under the juvenile trilogy (RSA 169-B, C or D) or any support or custody orders made under the authority of RSA 458 or any order relating to the title of real or personal property.

NOTE: Fitchner v. Pittsley, decided June 19, 2001, suggests that where there is an existing custody order, the district court must transfer the case.

N. JUDICIAL INSTRUCTIONS TO THE PARTIES

PROTOCOL 7-28

The following are recommended remarks at the conclusion of a domestic violence hearing when an order has been issued.

After reviewing the specific provisions of the order which have been marked by the judge, the court should advise the parties:

1. The order will remain in effect for one year unless sooner withdrawn by the plaintiff.
2. If still in fear, the plaintiff may request an extension at the expiration of the order, and the defendant will be given an opportunity for a hearing.
3. The order prohibits contact of any form. If any is needed, the parties must motion the court and a hearing will be scheduled.
4. Although the order restrains only the defendant's conduct (i.e., the plaintiff cannot be arrested for having contact), the plaintiff is strongly encouraged not to have contact with the defendant. (The court should make reference to the written notice that must be provided to the plaintiff under the statute.)
5. The order will be entered into a national registry (NCIC) which is maintained by the FBI. The order is effective throughout the country and will be enforced by law enforcement and the courts everywhere.
6. The staff will provide the plaintiff with a certified copy, which s/he should keep on him/her at all times.
7. The defendant will be given his copy (or mailed if not present).
8. The order prohibits the defendant from having access to or possession of firearms and ammunition during its term. Attempts to purchase, or being in possession of a firearm, may lead to prosecution under state and federal laws. The penalties can be significant.
9. If not already done, the defendant's firearms must be surrendered to law enforcement for the duration of the order. At the expiration of the order, the defendant may apply for their return.
10. Any questions?

O. NOTIFICATION TO THE DEFENDANT

RSA 173-B:8, II provides that any final order or modified order issued pursuant to RSA 173-B, other than a temporary order, shall be mailed to the defendant at the defendant's last address of record, if the defendant has not appeared for the hearing.

PROTOCOL 7-29

Upon issuance of any final order or any order modifying or vacating an order, the clerk must mail a copy of the order to the defendant at the defendant's last address of record.

COMMENT

While there is no statutory requirement that a defendant be personally served with a final or modified order, the defendant does have a duty to keep the court apprised of his current address. There may be cases where, due to the particular circumstances, the court has reason to believe that personal service of the order on the defendant should be arranged to ensure prompt and verifiable notice. In that event, the clerk should contact the appropriate law enforcement agency and request service of process.

P. MUTUAL RESTRAINING ORDERS AND CROSS-ORDERS FOR RELIEF

INTRODUCTION

Cross Orders for Relief means separate orders granted to parties in a domestic violence situation where each of the parties has filed a petition pursuant to this chapter on allegations arising from the same incident or incidents of domestic violence.

Mutual Order for Relief means an order restraining both parties from abusing the other originating from a petition filed by one of the parties and arising from the same incident or incidents of domestic violence, based upon only one petition being filed.

PROTOCOL 7-30

Mutual orders for relief shall not be granted. (RSA 173-B:5, V)

COMMENT

Mutual orders for relief (e.g., where a plaintiff files a petition, and the court enters orders against not only the defendant, but plaintiff as well, even though the defendant never filed a petition seeking an order of protection) are now expressly prohibited by statute.

PROTOCOL 7-31

Cross orders for relief may be granted only if each party has filed a petition against the other which has been properly served, each party has been given adequate notice of the hearing and the opportunity to defend against the allegations, and the court finds that each party has abused the other within the meaning of RSA 173-B. Such orders shall be issued only under circumstances where the court cannot determine that one party was the predominant aggressor.

COMMENT

It should be clear to all judges, however, that even where each party has committed an act of domestic violence, as defined by the statute, an order should be made only against the predominant aggressor. In determining who is the predominant aggressor, the court should consider the intent of this chapter to protect victims of domestic violence, the relative degree of injury or fear inflicted on the persons involved and any history of domestic abuse between these persons. (RSA 173-B:10, II)

NOTE: Court staff should be aware that when cross petitions are filed the parties should be separated and court security should be notified.

Q. ISSUANCE OF FINAL ORDERS

PROTOCOL 7-32

If possible, decisions should be rendered on the date of the hearing.

PROTOCOL 7-33

Staff shall process court orders on the day the decision is rendered.

R. APPEALS

PROTOCOL 7-34

The findings of fact made by the district court in domestic violence cases are final; however, questions of law may be transferred to the supreme court.

PROTOCOL 7-35

Upon the completion of a contested hearing, the parties must be given a copy of "Notice of Appellate Rights," AOC Form (284-008).